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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 504

EDGAR LaLANCETTE,
PETITIONER,

v.

THEODORE F. GOLOSKIE ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

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of Providence, State of Rhode Island is not reportable. A copy thereof and a copy of the Decree of that Court which was affirmed by the Supreme Court of Rhode Island are attached as an appendix to this petition.

Jurisdiction

The decree of the Supreme Court of the State of Rhode Island was entered on July 19, 1960. Rehearing was denied on July 29, 1960. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257(3) providing for review by writ of certiorari where any right, title, privilege or immunity is specially set up or claimed under the constitution.

Questions Presented

(1) Whether the respondents, Theodore F. Goloskie and Susan C. Goloskie, are entitled to an Injunction enjoining petitioner, in effect, from boating, fishing and swimming in and on the waters of the Ponagansett Reservoir northerly of the Snake Hill Road in the Town of Glocester, Rhode Island?

(2) Whether petitioner, in the particular circumstances of this case, is a riparian proprietor on the Ponagansett Reservoir south of the Snake Hill Road and by reason thereof entitled as a matter of right to boat, fish and swim in and on the whole surface of the reservoir and to the declaratory and injunctive relief prayed for in his Answer in the nature of a Cross Bill?

(3) Whether it is a denial of due process in violation of the provisions of Section 1 of Amendment XIV of the Constitution of the United States for the Supreme Court of Rhode Island to refuse to consider and decide all of petitioner's reasons of appeal and for the Supreme Court

of Rhode Island to allow the Trial Justice who had heard the case at bar in the Trial Court and who at the time of the rendition of the Opinions of the Supreme Court of Rhode Island herein was a member thereof to participate in said Opinions?

(4) Whether the Supreme Court of the State of Rhode Island erred in deciding that there is no merit to petitioner's contentions that he did not receive the benefit of a fair and impartial trial because the trial justice did not apply the same rule of law to his claim for equitable relief under his cross bill as was applied to the complainants' claim and that the trial justice's action amounted to a denial of due process in violation of Article XIV of Amendments to the Federal Constitution and in deciding that such contentions are frivolous although petitioner has argued them at considerable length?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which are relevant to a decision of this case are Section 1 of Amendment XIV of the Constitution of the United States and Sections 5-8-1, 9-14-9, 9-14-12, 9-14-23, 9-19-13, 42-33-4 and 42-33-7 of the General Laws of Rhode Island of 1956 as amended. The pertinent text thereof is set forth in an appendix attached to this petition.

Statement

This petition seeks to review a decree of the Supreme Court of Rhode Island which affirmed a decree of the Superior Court for Providence County granting the present respondent an injunction enjoining the present petitioner from boating, fishing and swimming and from inciting others to do such acts upon or in the water upon the land

described in PARAGRAPH FIRST of the present respondents' Bill of Complaint and denying the present petitioner the affirmative relief sought in his Answer in the nature of a cross bill.

The controversy herein revolves around riparian rights of boating, fishing and swimming in a body of water known as the Ponagansett Reservoir. This Reservoir was artificially created around 1855 by the construction of a dam across a natural stream of fresh water which flowed in a southerly direction from the Ponagansett Pond on the north down across the Snake Hill Road. This dam was constructed at a point approximately one-half mile to the south of said road in such a manner that the water in the Reservoir is maintained at a normal level of 25 feet. The Ponagansett Reservoir is situated in the Town of Glocester, Rhode Island and is shaped somewhat like a large figure eight and it extends on both sides of the Snake Hill Road which runs from east to west. A portion of said road was inundated by the waters of the Reservoir and there are no markers on the surface of the Reservoir to indicate the location of the portion of the road which is covered by water. That portion of the road which is situated on dry land on the easterly side of the Reservoir is approximately 700 feet southerly of that portion of the road which is situated on dry land on the westerly side of the Reservoir. It appears that the gate of the dam was opened in 1927 and the water in the Reservoir allowed to flow out and that this condition existed from said date until 1943 when the Reservoir was again filled to its normal level at which it has remained constant from said 1943.

In 1943, the present respondents purchased land in the Town of Glocester. They claim, in essence, that the bed of the Ponagansett Reservoir north of the road is land within the bounds described in their deed. They further claim that by virtue of their deed that they have the ex-

clusive right to boat, fish and swim in and on the water superadjacent to the aforesaid land. And they admit in their Bill that they have boated, fished and swam on the whole surface of the Reservoir. They also claim that the original Ponagansett Pond is on their land and that there are natural springs thereon.

In their Bill, the present respondents allege that the present petitioner has continuously and repeatedly trespassed on their portion of the pond and has invited others so to do and that he refused to accede to their demand and request to desist therefrom and threatened to continue the commission of said trespasses. Inconsistent with said allegation, they did in PARAGRAPH 7 of their Answer to the Petitioner's Answer in the nature of a cross bill admit that they did on an occasion in 1956 order the present petitioner to refrain from fishing and boating in a certain body of water to which they claim title and that said petitioner was deterred by law enforcement officers from further use of said body of water for the purposes aforesaid. Did said admission change the aforesaid allegation of trespasses and the nature of the action brought by the present respondent?

At the time of the filing of his Answer in the nature of a cross bill, the present petitioner and his wife were the owners of four of five lots they had purchased in 1953. This land is located in said Town of Glocester on the southerly side of the Snake Hill Road and on the easterly banks of the Ponagansett Reservoir. In his Answer, the petitioner denies the charges made against him in the Bill and asserts his constitutional rights to the full, proper and reasonable use of the waters of the Ponagansett Reservoir to which he has access to from his own property and therein he specifically invokes the protection and benefits of the 'Due Process and Equal Protection Clauses' of the Fourteenth Amendment to the Constitution of the United States.

He further alleges that the present respondents invited him to boat and fish on the waters of the Reservoir north of said road which allegation is denied by the present respondents.

The present respondents filed a Replication to the Petitioner's Answer to the allegations contained in the Bill and an Answer to the petitioner's Answer in the nature of a cross bill and the pleadings were closed by the filing of a statutory replication by the petitioner to said Answer.

The Ex Parte Restraining Order issued on August 20, 1956 was dissolved and vacated on September 5, 1956 and the prayer of the complainants below for a Temporary Injunction was denied on October 9, 1956 when the complainants below failed to appear at said hearing.

The deed of the complainants below and certified copies of eight other deeds and two wills were offered in evidence as their 'Chain of Title' (Complainants' Exhibits 'A' – 'K'; Tr. pp. 1-7). Petitioners' objection to the introduction of the deed of the complainants below was overruled upon the express assurance of Counsels of the complainants below that they had all of the prior deeds in the 'Chain of Title' and were now prepared to introduce them (Court-Counsels, Tr. pp. 2-3) and his motion to strike said Exhibits after the introduction of the deed represented by Complainants' Exhibit 'K' was denied without prejudice to his right to renew it at the appropriate time (Court-Fox, Tr. p. 7). Thereafter, Theodore F. Goloskie, one of the complainants below, testified that he had searched his title and had found that the Ponagansett Reservoir Company has a privilege to flow his land and that he does not have a deed showing that privilege (Tr. pp. 29-31, Q. 125-127) and his chief witness testified that all the Ponagansett Reservoir received was the water rights (Tr. pp. 58-59, Q. 90). This missing deed was, after other means of producing it had failed (Tr. p. 31; pp. 78-79), introduced by peti-

tioner as Respondent's Exhibit '3' along with two other deeds relating to land under the Reservoir north of the Snake Hill Road which were introduced as Respondent's Exhibits '4' and '5' (Tr. pp. 81, 82).

A drawing purporting to be a survey made for the Ponagansett Reservoir Company in the ordinary course of business was allowed in evidence as Complainants' Exhibit 'N' (Tr. pp. 100-101) upon the testimony of a witness who had no actual personal knowledge thereof (Tr. pp. 97-102). It purports to show the land and flowage rights of said Company and its purpose is to rebut deeds and surveys recorded in the Land Evidence Record of the Town of Glocester.

Mr. Waterman was allowed to draw his conception of a body of water shown on an unidentified aerial photograph on a blueprint of Complainants' Exhibit 'L' for the purpose of showing the location of the Ponagansett Pond (Tr. pp. 107-108, Q. 114-120). This drawing was admitted in evidence as Complainants' Exhibit 'P' (Tr. p. 110) even though the witness could not say that the aerial photograph fairly represented what it purported to represent (Tr. pp. 108-109, Q. 125-126) and even though he could not say that his conception reasonably represented the portion that was covered with water in 1939 (Tr. p. 109, Q. 128-129). Contrary thereto, this witness testified that the pond was in a different location and not entirely on the land of the complainants below (Tr. p. 120, Q. 175-178) and their Counsel indicated that it would take someone from 1855 to answer questions relating to conditions of the original stream (Hennessey, Tr. p. 137).

The complainants below, although other surveys had been made of their land (Tr. p. 23; p. 32; pp. 117-118; Respondent's Exhibit '6', Tr. p. 157), introduced a survey made by Frank M. Waterman (Tr. pp. 42-46) in 1958 (Tr. p. 116). The petitioner's motion to strike this survey, after

Frank M. Waterman had testified that he did not know all of the land formerly owned by the complainants' ancestor in title (Tr. p. 48, Q. 40-41; pp. 56-57, Q. 83-87), was denied (Tr. p. 57). This survey had two starting points (Tr. p. 53, Q. 68; pp. 142-143, Q. 251) and had land indicated thereon that was conveyed under the deed represented by Respondent's Exhibit '3' (Tr. pp. 131-133, Q. 217-226) and it was made by a witness who admits that he allows people to point out their boundaries (Tr. p. 139, Q. 244) and that he copied part thereof from Complainants' Exhibit 'N' and that he has shown thereon land not belonging to the complainants below (Tr. pp. 119-122) and that he is not saying that title is in the complainants (Court-Witness, Tr. p. 60) and that there is nothing in the complainants' deed showing that they are bounded other than on the north by land of Page (Tr. p. 123).

The gist of the testimony of the grantor of the complainants below is that she had possession of this land because she pastured cattle and picked berries on a portion of it when the water was down and that during that period the water was non-navigable (Tr. pp. 85-96). The possession of the complainants below was that they lived thereon from 1943 to the present time from the middle of June until the latter part of September (Tr. p. 12).

Theodore F. Goloskie, one of the Complainants below, testified that the Ponagansett Reservoir is not entirely upon his land but extends onto other land (Tr. p. 27, Q. 116-119); that there is the same amount of water in the Reservoir today as when he purchased his land in 1943 but that in 1927 there was only about one eighth that amount of water (Tr. pp. 14-15, Q. 45-52).

He further testified that he granted the respondent below permission to fish on the water superadjacent to his property (Tr. p. 17, Q. 70; p. 20, Q. 86; pp. 36, 37, Q. 153) and that he revoked said permission about one week before

the filing of the instant Bill (Tr. p. 20, Q. 86-87). On direct examination, he stated that the respondent below was out there in a speedboat (Tr. p. 18, Q. 77) and that he operated and rented between six or seven boats on which some people would put motors (Tr. pp. 19-20, Q. 81-85) and that the respondent below continued to go thereon after he had revoked said permission right up to the summer of 1957 (Tr. p. 19, Q. 78-80). On cross examination, he referred to one boat (Tr. p. 37, Q. 154-156). Cognizance should be taken that the complainants below filed their Answer on January 18, 1957 and that in PARAGRAPH 6 thereof they denied granting the respondent below permission to fish and that in Paragraph 7 they admit that they did on an occasion in 1956 order him to refrain from fishing and boating thereon and that he was deterred from further use thereof for said purposes by law enforcement officers. Cognizance should also be taken of the fact that the complainants below did not move to cite the respondent below for contempt of the Ex Parte Restraining Order issued on August 20, 1956.

The respondent below testified that he owns property on the Ponagansett Reservoir (Tr. p. 65, Q. 6-10) and that he did go fishing in the body of water on property the complainants claim to own (Tr. p. 72, Q. 21, 22) from his own property where he has a pier (Tr. p. 72, Q. 23-24; p. 74, Q. 34) and that he contends he has a right to do so (Tr. p. 74, Q. 35) and he explained that he asked permission to fish because he did not want trouble (Tr. pp. 73, 74, Q. 31). And his deed and a certified copy of the plat incorporated in and made a part thereof were introduced in evidence as Respondent's Exhibit '1' (Tr. p. 66) and '2' (Tr. p. 69).

Mr. Hennessey, Counsel for the complainants below, judicially admitted that the title of the respondent below is not in issue (Tr. p. 68) thus dispensing with the necessity of further proof thereon.

After said admission, a drawing was allowed in evidence

as Complainants' Exhibit 'O' over petitioner's objection (Tr. pp. 104-105). Complainants' Exhibit 'O' is a copy of Respondent's Exhibit '2' made in the Town Clerk's Office of the Town of Glocester, Rhode Island by Frank M. Waterman with additional markings made thereon by said Waterman in said Office for the purpose of specifying the boundary lines of the land of the respondent below from Mr. Waterman's conclusions from Land Evidence Records which are not in evidence (Tr. pp. 102-103, Q. 97-103). Even this illegal exhibit would, if entitled to any probative weight, prove that the petitioner is a riparian proprietor on the Reservoir when read in the light of the testimony of Mr. Waterman that his land extends to the bed of the river (Tr. p. 145, Q. 254-258). Said exhibit 'O' is evidence violative of the parol evidence rule because it contradicts Respondent's Exhibits '1' and '2', a recorded deed and plat.

The Trial Justice allowed the complainants below to introduce evidence not in conformity with the allegations in the pleadings (Tr. pp. 8-11) but denied the respondent the right to introduce evidence to substantiate his allegations (Tr. pp. 70-71, Q. 16-18). The Trial Justice allowed the complainants below great latitude on their examination of witnesses (Tr. pp. 44-54; pp. 87-91; pp. 106-110; pp. 150-152) but denied the respondent the right to cross examine said witnesses on the ground that a deed or instrument speaks for itself and what is there is there and a witness cannot change it by his answer (Tr. pp. 28, 29, 33, 34, 58, 59, 93, 94, 129, 130, 131, 140, 141). The Trial Justice allowed the complainants to introduce in evidence a drawing as an entry made in the regular course of business (Tr. pp. 100-101) but denied the respondent below the same right (Tr. p. 118). The Trial Justice denied the respondent below the right to have Mr. Waterman identify on Complainants' Exhibit 'L' what he is referring to as land con-

veyed under the deed represented by Respondent's Exhibit '3' (Tr. pp. 133-134) but he allowed Mr. Waterman to mark out his conception of a body of water depicted on an aerial photograph on a blueprint of Complainants' Exhibit 'L' (Tr. pp. 107-108) and then he allowed it in evidence as Complainants' Exhibit 'P' (Tr. p. 110) and he assisted the complainants by pointing out that an answer given would not appear on the record (Tr. p. 150, Q. 18).

The Trial Justice made no reference in his Rescript to the fact that the respondent below had prayed for injunctive relief nor to the fact that the complainants had filed an Answer to the respondent's answer in the nature of a cross bill and hence the Trial Justice could not have determined the merits of the case at bar because he did not examine it in the light of the issues made by the pleadings.

During the course of the trial of the case at bar, the Trial Justice stated on several occasions that the respondent below would have the right to put in evidence and to put in his own case (Tr. pp. 59-60; p. 64; p. 68; pp. 78-79; p. 82; p. 141) but in his Rescript he held, in essence, that the respondent below had no legal right to introduce evidence to contradict the title claimed by the complainants below nor to introduce evidence to substantiate his claim of riparian ownership. He stated, in essence, that the action brought by the complainants is one in equity to avoid continual trespasses and multiplicity of suits and that they have the same burden as if it were an action at law of trespass quare clausum fregit for a single alleged trespass (Rescript, p. 45) and that under the applicable law (Rescript, pp. 45-48) it is unnecessary to determine whether they have a clear title as the respondent does not claim title to the same land nor to be in privity with one who does (Rescript, pp. 48-49) and his appraisal of the evidence relating to their title clearly proves that he afforded no probative weight to the evidence introduced or elicited by the

respondent below (Rescript, pp. 44-45, 48-49) and that his conclusion that complainants below have color of title or apparent title by reason of their deed and their continuous occupation of the land conveyed therein since 1943 has no reasonable basis in the evidence.

The Rescript discloses that the Trial Justice did not apply the same principles of law to a consideration of the respondent's side of the case because his conclusion that the respondent is not a riparian owner in the sense that his land reaches or borders the Ponagansett River although it does extend to the water of the reservoir when the gate of the dam is closed and the water is caused to rise to the height of the dam (Rescript, p. 49) is predicated on an appraisal of evidence introduced by complainants below (Rescript, pp. 44-45) without any reference being made by the Trial Justice to evidence introduced by respondent below.

The Trial Justice denied respondent below equitable relief upon the premise that he had relied upon Section 17 of Article 1 of the State Constitution for his rights and that this Section was inapplicable (Rescript, p. 50) after he had found that respondent below asserted his rights upon his claim that he is a riparian proprietor on the reservoir (Rescript, pp. 44, 49) and after he had found that the respondent below relied upon the navigability of the water for his rights (Rescript, p. 49). Said findings are inconsistent with one another.

The Trial Justice, in essence, found that the respondent below could not be a riparian proprietor on the reservoir because the original stream on which it was created was non-navigable (Rescript, pp. 49, 50). Then, without any finding that the respondent below was guilty of a trespass or of inciting others so to do, the Trial Justice granted the complainants below a riparian injunction against boating, fishing and swimming (Rescript, p. 50). The Rescript dis-

closes that the Trial Justice did not identify the land of complainants below and that in granting said injunction that he referred to said land as "land described in the bill or however described (Rescript, p. 50)."

On July 19, 1960, the Supreme Court of Rhode Island, sitting as a Court of Equity, did deny and dismiss the appeal duly taken by the respondent below and did affirm the decree appealed from. Its decree was in the form of an Opinion written by its Chief Justice.

The Supreme Court of Rhode Island overruled the exceptions taken by the respondent below to rulings made by the Trial Justice (Opinion, pp. 31-34). In so doing, the Court did not consider or decide the actual exceptions presented by Reasons 8 and 9 of Respondent's Statement of Reasons of Appeal. Said exceptions related to rulings of the Trial Justice denying respondent's motion to strike Complainants' Exhibits 'A' to 'K' from the record and his motion to strike Complainants' Exhibit 'L' and the testimony of Mr. Waterman from the record. The Court considered said two exceptions as objections to the admissibility of evidence (Opinion, pp. 31-33). As to the first mentioned exception, the Court held that it was without merit as all the prior deeds purport to convey the same tract of land (Opinion, p. 32) and, as to the second mentioned exception, the Court held that the respondent below had misconceived the scope of the application of the parol evidence rule and that it is unable to see from its examination of the surveyor's testimony concerning the manner in which he identified the boundaries of complainants' land any reasonable basis for respondent's contention that the surveyor did not properly perform his duty in establishing said boundaries (Opinion, pp. 32-33). In overruling respondent's exception to the ruling of the Trial Justice sustaining complainants' objection to Question 227 on page 133 of the Transcript, the Court held that the Trial Justice properly sustained

said objection because here respondent was seeking to have the witness mark the complainants' exhibit to show a fact in proof of which the exhibit was not introduced (Opinion, p. 33). In overruling respondent's exception to the ruling of the Trial Justice overruling respondent's objection to the admission of Complainants' Exhibit 'O' in evidence, the Court held that this contention is without merit because this Exhibit and the testimony given by Mr. Waterman in connection therewith do not vary the respondent's deed but simply indicate the easterly line of his lots with relation to the shore of the reservoir (Opinion, pp. 33-34). The Court also held that the Trial Justice did not err in admitting Complainants' Exhibit 'X' in evidence (Opinion, p. 32).

The Court found, in essence, that the complainants below claim that the portion of the Ponagansett Reservoir north of the Snake Hill Road is their property subject only to the flowage rights of the reservoir company and that it is in effect a private pond in and on which respondent has no right to boat, fish or swim without their permission (Opinion, p. 36); that the complainants own the land described in the deed represented by Complainants' Exhibit 'A' (Opinion, pp. 34-35); that the respondent owns certain lots of land south of the Snake Hill Road (Opinion, p. 35); that said lands are separated by said road (Opinion, p. 36); that south of the road is another portion of the Ponagansett Reservoir with the fee thereof and to a narrow strip of surrounding land which is uncovered by water when the height thereof at the spillway is 25 feet appearing to be in the reservoir company (Opinion, pp. 35-36); that this strip of land separates respondent's lots from the reservoir although there was testimony by Mr. Waterman that when he measured the water it was at 26 feet and at that height it covered a small portion of respondent's lot 1 (Opinion, p. 36); that respondent presented no evidence that his lots bordered on such stream so as to constitute him a true

riparian proprietor and that indeed his own evidence does not show that his lots even border on the reservoir (Opinion, p. 37); that the Trial Justice did not err in applying the rule in actions of trespass quare clausum fregit to the evidence because respondent is not claiming title to complainants' close nor are complainants questioning his title but here the claim is solely one of threatened injury to complainants' possession (Opinion, pp. 37-38); that respondent contends further under point II that he did not receive the benefit of a fair and impartial trial because the trial justice did not apply the same rule of law to his claim for equitable relief under his cross bill as was applied to the complainants' claim and that he argued, among other things, that the trial justice's action amounted to a denial of due process in violation of article XIV of amendments to the federal constitution (Opinion, p. 38); and then the Court, in answer to the last mentioned contention of the respondent below, said on pages 38-39:

> There is no merit in any of those contentions and on face of the record they appear to be frivolous although respondent has argued them at considerable length. The fact is the evidence clearly showed that complainants had title to most of the land under the reservoir north of Snake Hill Road and unquestionably to all of it surrounding the natural pond and the brook that issued therefrom. On the other hand there was no evidence that respondent had title to any of the land under that part of the reservoir south of said road and certainly none showing that his land bordered on the brook which he called the Ponagansett River. Therefore the trial justice did not misconceive or misapply the law applicable to the facts before him. The respondent's reasons of appeal 1 and 4 which he has argued under point II are overruled."

The Court also overruled Reasons of Appeal 2, 3, 5 and 6 which were argued under Point III and point IV on the grounds that they are without merit and that the many authorities cited by the respondent have no application to the case at bar (Opinion, p. 39).

And, as to respondent's contention that the injunction granted was void for vagueness, the Court on pages 39-40 said:

> "There is one final contention with reference to the terms of the injunction which should be noted before we conclude. The respondent contends it is not clear and definite what premises he is enjoined from trespassing upon. While the description may be difficult to follow precisely, it is clear that it refers only to the complainants' premises north of the South Killingly Road now called Snake Hill Road. This road is well defined and can be readily identified by the respondent. If he continues to boat, fish or swim in the reservoir north of the road he will be violating the injunction. Of course it is possible that other owners of land bordering on the reservoir north of the road may have riparian rights as well as the complainants, but since the respondent is not claiming such rights by, through or under them or any of them he can gain no benefit from the existence of such a possibility."

And although the Court had found that the respondent below had sought injunctive relief (Opinion, p. 31) and although it found that his land is covered by water (Opinion, p. 36), it denied him injunctive relief by affirming the decree appealed from (Opinion, p. 40).

Petitioner duly filed a Petition for re-argument setting forth that the Court did not consider or decide Reason 9 of his statement of reasons of appeal; that the Court might

have sustained Reason 12 of his reasons of appeal if it had not overlooked the fact that Mr. Waterman had indicated on Complainants' Exhibit 'L' property conveyed under the deed represented by Respondent's Exhibit '3'; that it might have sustained Reason 11 if it had not overlooked or misconceived the testimony of Mr. Waterman and Respondent's Exhibit '2' and the fact that the public records purporting to show that property was sold outright from Potter to the Trustees of the Ponagansett Reservoir are not in evidence; that the Court might have arrived at a different conclusion if it had not misconceived the law which it held applicable hereto; that thereunder the complainants still have the burden of proof which they did not sustain, although the Court did not weigh the respondent's evidence, because the Court did not identify complainants' land; that the Court might have arrived at a different conclusion as to the vagueness of the injunction granted if it had not misconceived the evidence and its own findings and if it had comprehended that there are no markers on the surface of the reservoir defining the exact location of that portion of the Snake Hill Road which ran thereunder and if it had comprehended the exact location of the other two portions of said road on dry land on either side of the reservoir; that the injunction is too broad; that it might have arrived at a different conclusion if its attention had been directed to the principles of Equity Jurisprudence relating to necessary and indispensable parties; and that it might have arrived at a different conclusion if it had not overlooked or misconceived Respondent's Exhibits '1' and '2', respondent's testimony and the judicial admission of Mr. Hennessey (Tr. p. 68).

On July 29, 1960, the Supreme Court of Rhode Island denied said petition.

The appeal of the respondent below was heard on April 27, 1960. On that date, the Trial Justice was a Justice of

the Supreme Court of Rhode Island. He disqualified himself from sitting to hear the oral arguments. However, a careful examination of both of the Opinions of the Supreme Court in the case at bar leads to the conclusion that the Trial Justice who had heard the instant case in the Trial Court had also taken part in the rendition of the Judgement of the Supreme Court of Rhode Island herein.

Reasons For Granting The Writ

1. Petitioner urges this Court to grant the writ and to exercise its power of supervision because both of the Courts below radically departed from the accepted and usual course of judicial proceedings. A few examples will place this contention in proper focus.

The Supreme Court of Rhode Island found as a fact that complainants below claim that the portion of the Ponagansett Reservoir north of the Snake Hill Road is their property subject only to the flowage rights of the Ponagansett Reservoir Company[1] and that the evidence clearly showed that they have title to most of the land under the reservoir north of the road[2] and that others may also have riparian rights in that portion of the reservoir north of the road and that the injunction refers only to complainants' land north of the road.[4] Yet without construing complainants' deed pursuant to the common law of the State in order that their land might be identified with certainty, the Supreme Court of Rhode Island affirmed the injunction granted and stated that if respondent continues to boat, fish or swim in the reservoir north of that road he will be violating the injunction.[5] This is contrary to the accepted and usual

[1] Opinion, p. 36, *infra*.
[2] Opinion, p. 38, *infra*.
[3] Opinion, p. 40, *infra*.
[4] Opinion, p. 40, *infra*.
[5] Opinion, p. 40, *infra*.

course of judicial proceedings because said findings prove that complainants below did not sustain their burden of proof; that the Courts below did not identify their land; and that under any circumstance the injunction granted would be too broad. *Rubber Company* v. *Goodyear*, 76 U.S. 788, 793; *Hardin* v. *Jordan*, 140 U.S. 371, 390.

Neither of the Courts below found as a fact that petitioner had trespassed on or had incited others to trespass on land of complainants below but apparently proceeded on the premise that petitioner was guilty as a matter of law upon the basis of the allegations in the Bill of Complaint. This too is contrary to the accepted and usual course of judicial proceedings. *Rubber Company* v. *Goodyear*, supra; *McKee* v. *Gratz*, 260 U.S. 127, 136.

The Supreme Court of Rhode Island found as a fact that the Trial Justice had not erred in applying the technical rules in actions of trespass quare clausum fregit to the evidence as here the respondent is not claiming title to complainants' close nor are they questioning his title but here the claim is solely one of threatened injury to complainants' possession.[6] In effect, they sanctioned the action of the Trial Justice in rejecting Respondent's Exhibits '3' — '6' which evidence proves conclusively, if construed, that complainants below do not own any land under the reservoir and that they made an inconsistent claim relating thereto in 1946. This is contrary to the accepted and usual course of judicial proceeding because it denies petitioner the right to defend himself against the charge of trespass and thus deprives him of his statutory and constitutional rights. *Hager* v. *Reclamation District*, 111 U.S. 701, 708; *American Surety Co.* v. *Baldwin et al.*, 287 U.S. 156, 167; 9-14-9, 9-14-12 and 9-19-13 of the General Laws of Rhode Island of 1956.

[6] Opinion, pp. 37-38, *infra*.

Although the Supreme Court of Rhode Island had found, in essence, that the waters of the Ponagansett Reservoir covers the soil of several owners,[7] it sanctioned and condoned the finding of the Trial Justice that the portion of the reservoir north of the road is a private pond[8] because it cited *Public Utilities Comm'n* v. *East Providence Water Co.*, 48 R. I. 376, 394 as being applicable hereto.[9] This is not only contrary to the accepted and usual course of judicial proceedings but directly conflicts with the principles of law enunciated in *Hardin* v. *Jordan*, 140 U.S. 371 at 390.

Although the Supreme Court of Rhode Island had, in effect, rejected Respondent's Exhibits '3' — '5' and although the complainants below had introduced in evidence no deed purporting to show that the Ponagansett Reservoir Company was granted flowage rights in their land, the Supreme Court of Rhode Island, in reliance upon certain language contained in the deed represented by complainants' Exhibit 'B'[10] and upon oral testimony,[11] found as a

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[7] Opinion, pp. 35, 36, 38, 40, *infra*.

[8] Opinion, p. 36, *infra*.

[9] Opinion, p. 37, *infra*.

[10] "Subject, however, to all the rights and privileges of the Ponagansett Reservoir Company relative to the flowage of said Land with water, which may, at any time heretofore, have been granted".

[11] "Goloskie, Tr. p. 29

125 Q: I now quote from Complainants' exhibit B and after I read this quotation I shall ask you a question relating thereto "Subject, however, to all the rights and privileges of the Ponagansett Reservoir Company relative to the flowage of said land with water, which may, at any time heretofore, have been granted." Now I ask you, have you made a search of your title to determine what rights the Ponagansett Reservoir have in that property?

Mr. Hennessey: Objected to Your Honor.

The Court: I see no objection in asking whether this witness has made a search of the title.

Tr. p. 30

Mr. Hennessey: If he stops there I don't object Your Honor, of course this man isn't a title examiner or lawyer

fact that the reservoir company has only flowage rights in the portion of the reservoir north of the road.[12] This is certainly contrary to the cardinal rules of judicial con-

The Court: We know that he isn't.

Mr. Fox: He is making the allegation that he owns the property under the water.

The Court: But ordinarily a man doesn't look up a title himself, he has it looked up by a competent person. If you desire to ask the question whether he himself looked up the title you may. You may answer if the question is clear.

A: Would you repeat the question please?

The Court: Certainly, the stenographer will repeat the question.

(Stenographer repeated the question)

A: Yes.

126 Q: What did you find out?

A: I found that they have a privilege.

Mr. Hennessey: I object to that.

Mr. Boudreau: I see no point in a general broad question like what did you find out.

Mr. Fox: He said he had a search made.

The Court: As I understand the question was whether he had made a search of the title, I (Tr. p. 51) was assuming that he had not. His answer is that he has. If he has he can answer this question if he can. Do you understand the present question.

A: I do.

The Court: Very well you may answer it.

A: There is a privilege to flow some of my land.

127 Q: Do you have the deed showing that?

A: I haven't no."

"Waterman, Tr. pp. 58, 59

90 Q: In Complainant's exhibit B which is in the chain of title in the property for which you have made this survey, there is a reference made that the property was conveyed subject to all the rights and privileges of the Ponagansett Reservoir Company. Now I ask you in the course of your survey have you found a deed in this chain of title referring to the rights of the Ponagansett Reservoir Company?

Mr. Hennessey: I object as being immaterial.

Mr. Fox: No it is not immaterial.

The Court: I cannot say it is, whether it is or not, but I think the witness may answer the question, I will allow the question.

A: Well all the Ponagansett Reservoir Company received was the water rights."

[12] Opinion, p. 36, *infra*.

struction because an instrument must be construed before any Court can state whether it is a grant of an easement in particular land or a transfer of the ownership of such land. 3 Tiffany on Real Property, 3rd Ed. 1939, Sec. 776; 56 Am. Jur., Waters, Sections 163, 165. Such action was arbitrary because the complainants in their Reply Brief in the Supreme Court of Rhode Island admitted, in essence, that the deed represented by Respondent's Exhibit "3" is a deed in their chain of title which the Court should construed.[13]

The Trial Court cited *Campbell v. Rankin*, 99 U.S. 261 for the proposition that inactions of ejectment, or trespass quare clausum fregit, possession by the plaintiff at the time of eviction has always been held prima facie evidence of the legal title, and as against a mere trespasser it is sufficient. Both Courts below found that complainants below had possession of the land described in their deed. Neither of said Courts found as a fact that the land under the Ponagansett Reservoir is land within the bounds described in the deed of complainants below. If the land

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[13] "Complainants' Reply Brief—pp. 2-3

"The statement (page 8) (here 'statement' is a reference to petitioner's statement of fact in Court below) that the 'documentary evidence shows that in 1855 the Trustees for the Subscribers to the Ponagansett Reservoir acquired title to 90 and 4 100 acres of land situated northerly of said Snake Hill Road" is not admitted by complainants, who maintain that said Trustees acquired only flowage rights in the locus in question, and the statement that the Trustees acquired title to the land described in the deed to them is a gratuitous assumption by respondent of a fact to be determined by the Trial Court."

And at page 25 thereof:

"On page 54 of respondent's brief is contained the description set out in Respondent's Exhibit 3, a deed from Othniel Sanders and wife Mercy Sanders to Trustees for the Subscribers to the Ponagansett Reservoir. This deed the complainants claim gave only flowage rights over complainants' land to the trustees therein. Respondent claim it is a deed to the present bed of the pond."

under the reservoir is not land within the bounds described in complainants' deed then it is obvious that they never did have possession thereof. Hence the State Courts misconceived the import of the word 'possession' as used by this Court on the particular facts of the above cited case. There is certainly no evidence in the record that the complainants below ever had possession of land under the reservoir or that they had ever notified the reservoir company of their adverse claim thereto.

Although the case at bar was a case of first impression as to boating and fishing and swimming in Rhode Island, the Supreme Court of Rhode Island had always adhered to the Riparian Doctrine in deciding other cases relating to water rights.[14] Yet they refused to apply said doctrine to the case at bar. This is contrary to the law of Rhode Island.

Under the Riparian Doctrine, petitioner would have the legal right to boat, fish and swim in and on the Ponagansett Reservoir. *Hardin* v. *Jordan*, supra.

Petitioner submits to this Court that the Supreme Court only applied a portion of Sec. 9-19-13 of the General Laws of Rhode Island of 1956 to its consideration of the admis-

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[14] *Olney* v. *Fenner*, 2 R.I. 211; *Richmond Mfg. Co.* v. *Atlantic Delaine Co.*, 10 R.I. 106; *Silver Spring Bleaching & Dueing Company* v. *The Wanskuck Company*, 13 R.I. 611; *Duer* v. *Cranston Print Works Company*, 22 R.I. 506; *Hood* v. *Sletkin*, R.I. , 143 A. 2d 683.

In *Duer* v. *Cranston Print Works Company*, supra, the Court said at page 515:

> "As to reservoirs constructed upon the stream itself or its tributaries, the law is well settled that all riparian proprietors are entitled to share the benefit of them, whether they contribute to their construction and maintenance or not. If one proprietor, for his own benefit, regulates the natural flow of the water so as to diminish the flow when it is excessive and to augment it when it is deficient, using, however, only the water which would naturally pursue the same course to the sea, he gains thereby no advantage over his neighbor, but must permit him to share equally in the benefits of the arrangement. * * *".

sibility of Complainants' Exhibit 'X' and to its consideration of petitioner's right to rebut same and that there is another portion thereof which affords petitioner the right to introduce evidence affecting the weight thereof. This action is a denial of the equal protection of the law.

Prior to the entry of the decree of the Supreme Court of Rhode Island, the General Assembly of Rhode Island did in 1958 enact a Statute[14a] which apparently affords all citizens of the State to boat, fish and swim in and on any body of water within the State to which they can gain access to from any public right of way. Therefore the injunction granted below is illegal as well as being unconstitutional.

The Supreme Court of Rhode Island found as a fact that petitioner's evidence does not show that his lots border on the reservoir[15] and that he presented no evidence that his lots bordered on the stream so as to constitute him a true riparian proprietor[16] and that there was no evidence that he had title to any of the land under that part of the reservoir south of the road and certainly none showing that his land bordered on the brook which he called the Ponagansett Reservoir.[17]

Respondent's Exhibits '1' and '2' are a recorded deed and a certified copy of a plat incorporated in and made a part of the deed. On said Exhibit '2', petitioner's land is delineated as bounded by the 'Upper Ponagansett Reservoir'. Hence there is a rebuttable presumption that his grant extends to the middle or thread of the original stream. *Hardin* v. *Jordan*, 140 U.S. 371, 391. At the time that Respondent's Exhibit '2' was admitted in evidence, complainants' Counsel judicially admitted that his title is

[14a] Sections 42-33-4, 42-33-7, G.L. of R.I. of 1956.
[15] Opinion, p. 37, *infra*.
[16] Opinion, p. 37, *infra*.
[17] Opinion, p. 38, *infra*.

not in issue.[18] This admission dispensed with the necessity of petitioner offering further proof that his grant extend to the middle or thread of the original stream and made this rebuttable presumption irrebuttable. *The Washington Trust Company* v. *Bishop*, 78 R. I. 157, 159 (1, 2). Petitioner had no reason to anticipate that the Supreme Court of Rhode Island would, after all evidence was in and after he no longer could add to the record, go against all the rules of evidence and hold that he had not proved that he owns land bounding on the original stream. Therefore petitioner had legally done all that he could do in the case at bar to prove his title. *Saunders* v. *Shaw*, 244 U.S. 317, 320.

It is vividly apparent from the last mentioned findings of the Supreme Court of Rhode Island, that said findings were predicated on Complainants' Exhibits 'N' and 'O' and the testimony of Mr. Waterman.[19] Petitioner submits, that this fact proves that the State Court did not apply the same law to his side of the case as it did to the side of the complainants below because here the Courts, in effect, rejected all of his evidence contradicting complainants' claim

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[18] "Hennessey, Tr. p. 68

Mr Hennessey: We are not going into his title, his title is not in issue in this case, it doesn't appear that any of the land he claims to have owned is the land that Golinski says he owns."

[19] The following testimony was given by Mr. Waterman after Complainants' Exhibit 'O' was admitted in evidence and was in reference thereto.

"Waterman, Tr. p. 106

108 Q: Mr. Waterman you have drawn a red line around a certain area on this map is that right?

A: That is right.

109 Q: What does that red line indicate?

A: Well that is the easterly boundary line of the property which was sold outright from Potter to the Ponagansett, the Trustees of the Ponagansett Reservoir.

110 Q: In other words what you are telling me is that this red line indicates the property line of the City of Providence with

yet simultaneously afforded great probative weight to complainants' evidence contradicting his title. This contention is supported and corroborated by the fact that the Supreme Court of Rhode Island held that Complainants' Exhibit 'O' and the testimony of Mr. Waterman do not vary respondent's deed but simply indicate the easterly line of his lots with relation to the shore of the reservoir and that it found that the fee to the bed of the reservoir south of the road and to a narrow strip of surrounding land uncovered by water when the height thereof at the spillway is 25 feet appears to be in the Ponagansett Reservoir Company.[20] This contention is further supported and corroborated by the fact that the Supreme Court, after finding that the Trial Justice did not err in finding that petitioner was not a riparian owner, said:[21]

> "Of course it may be true that in certain special circumstances the owners of land abutting on an artificial pond could be entitled to riparian rights therein, as we indicated in Hood v. Slefkin, R.I., 143 A. 2d 683, 686, but respondent has shown no special circumstances that would support such a claim here."

The special circumstances referred to by the Supreme Court are as follows:

> reference to this particular property which is adjacent thereto?
>
> A: I don't understand your question.
>
> 111 Q: This red line indicates the property line of the City of Providence?
>
> A: Yes.
>
> 112 Q: This plat here doesn't take in the Goloskie land or any portion of the Goloskie land, it takes in the portion owned by the respondent isn't that right?
>
> A: That is right.

[20] Opinion, pp. 34, 35, 36, *infra*.

[21] Opinion, p. 37, *infra*.

> "While it is true that the owners of land abutting on an artificial pond may be riparian proprietors therein, Angell on Watercourses (5th ed), Sec. 41, p. 37, it does not appear from an examination of the record here either that these complainants have proved by a preponderance of the evidence that they have riparian rights in the pond or that their predecessors in title had riparian rights in the streams from which the pond was formed."

Petitioner submits that the Supreme Court of Rhode Island did in the following paragraph[22] of its Opinion in the case at bar specificially state, among other things, that the *Hood* case is not in point on the issue relating to complainants' claim. In other words, it held that petitioner must prove by a preponderance of the evidence that he is a riparian proprietor and that complainants below does not have the same burden. This certainly is two separate and distinct rules of law notwithstanding that the Supreme Court of Rhode Island held that petitioner's contention on this point appears to be frivolous.[23]

The Supreme Court of Rhode Island made no reference to the fact that the Trial Justice had refused to allow petitioner to testify in support of the allegations in his Answer nor to the manner in which he conducted the Trial and apparently sanctioned and condoned all of his actions.

On numerous occasions, the Supreme Court made findings of fact unsupported by the evidence in the record.

It is a well settled and fundamental principle of law in Rhode Island that a Court of Equity speaks by its Decree. *Tabor* v. *Tabor*, 73 R.I. 491. If this is so then it is vividly apparent that the Trial Justice who had heard the case at bar in the Trial Court had also participated in the Opinions

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[22] Opinion, pp. 37, 38, *infra*.
[23] Opinion, p. 38, *infra*.

rendered in the case at bar by the Supreme Court of Rhode Island because there is no language therein stating that he did not participate therein although he was a member thereof at the time said Opinions were rendered. This is the most extreme departure from the accepted and usual course of judicial proceedings that petitioner can think of. In addition thereto, the Opinions of the Supreme Court clearly disclose that the Court refused absolutely to consider and decide Reasons 8 and 9 of petitioner's Statement of Reasons of Appeal which were duly briefed and argued pursuant to the laws of Rhode Island. This too is an extreme departure from the accepted and usual course of judicial proceedings.

2: The constitutional issues resolved by the Supreme Court of Rhode Island[24] are of the utmost general importance. The basic question presented is whether petitioner was deprived of his fundamental rights of property without due process of law by being denied a fair and impartial hearing.

The Supreme Court of Rhode Island, in finding that the Trial Justice had not erred in applying the rule in actions of trespass quare clausum fregit to the evidence, held that the cases of *Talbot* v. *Town of Little Compton*, 52 R.I. 280, *Olney* v. *Fenner*, 2 R.I. 211, and *Hood* v. *Slefkin*,—R.I.—, 143 A. 2d 683 are not in point on the issue. This issue referred to purports to be whether complainants below have possession of their land.[25] The Supreme Court, in finding that the Trial Justice had not erred in finding petitioner not to be a riparian owner as claimed,[26] held, in essence, that the case of *Hood* v. *Slefkin* governs this issue.[27] In other words, the Supreme Court of Rhode Island held that

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[24] Opinion, pp. 38, 39, *infra*.

[25] Opinion, pp. 37, 38, *infra*.

[26] Opinion, p. 37, *infra*.

[27] Opinion, p. 37, *infra*.

under the rule applied to complainants' side of the case that petitioner could not introduce any evidence to contradict their title because he did not claim title to the same land but that under the rule applied to petitioner's side of the case petitioner had the burden of proving by a preponderance of the evidence that he was a riparian owner and the complainants had the right to introduce evidence to contradict his title even though they admit his title is not in issue. Therefore, the finding of the Supreme Court of Rhode Island that petitioner's contention that he was denied a fair and impartial trial is frivolous[28] is a mere subterfuge for depriving petitioner of his fundamental rights of property without due process of law.

Both of the Courts below treated petitioner as if he had no legal right to defend himself against the false charge made against him nor to protect his fundamental rights of property.

In such circumstances, it is the specific duty of this Court to make its own independent examination of the within record in order to determine for itself whether or not petitioner was deprived of his property without due process of law. *Carlson v. State of Washington*, 234 U.S. 103, 105; *Merchants' National Bank of Richmond* v. *City of Richmond*, 256 U.S. 635, 638; *Craig* v. *Harney*, 331 U.S. 367, 373-374; *Brooklyn Saving Bank* v. *O'Neil*, 324 U.S. 697, 703; *Niemotko* v. *Maryland*, 340 U.S. 268, 271; *Local Union No. 10, United Association of Journeymen Plumbers & Steamfitters et al.* v. *Graham et al., Trading as Graham Brothers*, 345 U.S. 192, 197, footnote 4; *Napue* v. *Illinois*, 360 U.S. 264, 271-272.

3. It is inescapable that the public interest requires the prompt settlement by this Court of the grave constitutional questions involved in this case in view of the fact that this

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[28] Opinion, pp. 38, 39, *infra*.

Court has held or recognized that the basic doctrine of riparian rights in flowing streams prevails with minor variation in thirty-one states of the Union and that equality of rights between riparian owners is the essence of this doctrine. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 504-506.

Conclusion

For the foregoing reasons, it is respectfully submitted:

1: This petition for a writ of certiorari should be granted.

2: This case should be set down for argument at the earliest practicable time.

Respectfully submitted,

Francis D. Fox
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Providence 8, R. I.
Counsel for Petitioner

Appendix A

Equity No. 2760. Supreme Court

Theodore F. Goloskie et ux.

v.

Edgar LaLancette.

OPINION

Condon, *C. J.* This is a bill in equity to enjoin the respondent from continued trespassing on the complainants' land located in the town of Glocester and on a body of water covering a certain portion of such land. The respondent filed an answer in the nature of a cross bill by which he sought to enjoin the complainants from interfering with his right to fish, boat and swim in said body of water. The cause was heard in the superior court on bill, answers, replications and proof and resulted in the entry of a decree granting the relief prayed for by the complainants and denying the relief sought by the respondent. The cause is here on the respondent's appeal from such decree.

The respondent's reasons of appeal are nineteen in number but only those numbered 1 to 6 and 8 to 12 inclusive have been briefed and argued. In accordance with our long-established rule the reasons not briefed are deemed to be waived. For purposes of argument respondent has grouped his reasons of appeal under four separate points in his brief. Reasons 8 to 12 are argued under point I and designated A, B, C, D and E; reasons 1 and 4 under point II; and reasons 2, 3, 5 and 6 under points III and IV. In our discussion we shall follow that order.

Under point I-A the contention is made that the trial justice erred in admitting into evidence complainants' exhibits A to K. These exhibits consisted of complainants' deed to the *locus in quo* and certified copies of prior deeds and wills purporting to be in their chain of title back to

the year 1844. The respondent contends that the purported chain of title is not complete so that it was impossible for the trial justice to know with certainty what land the complainants own, particularly with reference to the body of water on which the alleged traspasses have occurred and are threatened in the future. We have examined such exhibits and are of the opinion that there is no merit in the contention. Except for a minor, inconsequential variance in the description in complainants' deed all prior deeds purport to convey the same tract of land.

Under point I-B it is contended that complainants' exhibit X was erroneously admitted. This exhibit is a map of the Ponagansett Reservoir made and prepared for the Ponagansett Reservoir Company by J. A. Latham & Son. Stanton M. Latham testified that his father, now deceased, made the map in the regular course of business and that it was among the records of their office. The respondent argued that since the witness had not himself prepared the map it was not admissible. The complainants contended that it was admissible under general laws 1956, § 9-19-13. This statute has been customarily given a liberal construction. In the circumstances here the trial justice did not err in admitting the map as a record made in the usual course of business *Albert S. Eastwood Lumber Co. v. Britto*, 51 R. I. 406. The respondent advanced other grounds in support of his contention, but we see no need to discuss them since they are clearly lacking in merit.

Under point I-C he contends that the trial justice erred in admitting complainants' exhibit L which is a plan of their land made by Frank M. Waterman, a licensed surveyor and engineer. The respondent contends that the surveyor did not properly perform his duty in establishing the boundaries of complainants' land and that therefore the map was not properly admitted. We have carefully examined the surveyor's testimony concerning the manner

in which he identified the boundaries of complainants' land and we are unable to see any reasonable basis for the respondent's contention on this score. He also argues in support of the inadmissibility of the exhibit that it violates the parole evidence rule. There is no basis for any such argument. It appears to us that respondent misconceives the scope of the application of that rule.

Under point I-D he contends that the trial justice erred in not permitting him to have Mr. Waterman mark in red pencil on complainants' exhibit L the location of a certain area of land described in a deed which respondent had introduced in evidence and which the witness testified he had surveyed. In support of his contention he refers us to *Round* v. *Barns*, 77 R. I. 135, and *Albro* v. *Matteson*, 64 R. I. 494. Neither of those cases has any application to the matter in controversy. Here the respondent was seeking to have the witness mark the complainants' exhibit to show a fact in proof of which the exhibit was not introduced. In our opinion the trial justice quite properly sustained complainants' objection.

Under point I-E respondent contends that complainants' exhibit O was erroneously admitted. This exhibit is a copy of a plat of lots on file in the town clerk's office. This copy was made by Mr. Waterman at the request of complainants after respondent had introduced into evidence a plan of these lots and a deed to him of lots 1 to 5 thereon. Exhibit O corresponded precisely with such plan except that it bore a red line which the surveyor made thereon to show the easterly boundary line of the property which was sold outright to the trustees of the Ponagansett Reservoir Company. He also testified that this plat had no reference to complainants' land.

The respondent further contends that the introduction of this exhibit violates the parole evidence rule in that the markings thereon made by the witness vary, modify or

detract from the recorded plan of lots shown by his exhibit 2 and also from his exhibit 1, the deed to him of lots 1 to 5. This contention is without merit. The complainants' exhibit and the testimony given by Mr. Waterman in connection therewith do not vary the respondent's deed, but simply indicate the easterly line of his lots with relation to the shore of the reservoir. Hence the situation here is not at all like that presented in *Gaddes* v. *Pawtucket Institution for Savings*, 33 R. I. 177, *Kuzoian* v. *Jaffa*, 52 R. I. 367, or *Allen* v. *Marciano*, 79 R. I. 98, upon which respondent relies. The respondent's reasons of appeal 8, 9, 10, 11 and 12 under which the above contentions were made are therefore overruled.

This leaves his other points for consideration in the light of all the evidence which the trial justice had before him. It is advisable to make this statement because respondent's contentions in support of some of those points are predicated at least in part upon the validity of his objections to the trial justice's rulings on the evidence.

The following facts are established by all the evidence. On December 6, 1943 Mabel F. Place conveyed by warranty deed to complainants certain real estate described therein as follows:

> "A certain farm or tract of land, situate in said Glocester, with all buildings and other improvements thereon, containing 225 (two hundred twenty-five) acres, be the same more or less, and bounded and described as follows, to wit: Northerly on land now or formerly of David Page, Easterly on the highway and land now or formerly of Joseph Davis' heirs, Southerly on land now or formerly of Smith Peckham and the South Killingly Road, and Westerly on land now or formerly of Theodore D. F. Hammond and Amasa Tucker. Meaning and intending to convey hereby

whether the above description be sufficiently broad or not, all real estate formerly owned by the late Othniel Saunders and or his late wife or widow, Mercy Saunders, and including the property conveyed to the said late Mercy Saunders by Alvin H. Shippee, administrator of the estate of Othniel Saunders, by deed dated July 22, 1871, and recorded in Gloucester Land Records in Book No. 27 at page 628, the latter parcel being subsequently conveyed to this grantor by Executrix's Deed of Amey J. Saunders, through her duly qualified executrix, Hannah S. (or M.) Mann, and recorded in said Gloucester Land Records in Book No. 45 at page 475, the intent of which said last-mentioned deed having been to convey to this grantor, whether the description therein was sufficiently broad or not, all the real estate owned by the said late Othniel Saunders and or his late wife or widow, Mercy Saunders. Subject to encumbrances of record."

Thereafter complainants took actual possession and made valuable improvements thereon and have continued in occupation ever since. At the time they took possession, a substantial portion of the farm was covered by water forming a part of Ponagansett Reservoir north of the South Killingly Road now called Snake Hill Road. Prior to 1941 this part of the reservoir was dry except for a natural pond with a small brook flowing southerly from it. It was in that condition when complainant Theodore F. Goloskie first saw it in 1927, and also in 1939. Mabel F. Place testified that when she owned the farm she pastured cattle and picked blueberries on the part now covered by water. There was also testimony that it remained dry until the dam was built or rebuilt in 1941.

The respondent owns certain lots of land south of Snake Hill Road. South of that road there is another portion of

the Ponagansett Reservoir. The fee to the bed thereof and to a narrow strip of surrounding land uncovered by water when the height thereof at the spillway is 25 feet appears to be in the Ponagansett Reservoir Company. This strip separates respondent's lots from the reservoir, although there was testimony by Mr. Waterman that when he measured the water it was at 26 feet and at that height it covered a small portion of respondent's lot 1. The respondent's land does not adjoin complainants' land but is separated therefrom by Snake Hill Road. The reservoir company has only flowage rights in the portion of the reservoir north of the road, the fee thereof remaining in the complainants' predecessors in title including Mabel F. Place, their immediate predecessor.

The complainants have no quarrel with respondent as to his supposed rights in the reservoir south of Snake Hill Road. All that they claim is that he has no rights in the portion north of the road because such portion is their property subject only to the flowage rights of the reservoir company. In other words they claim that this part is in effect a private pond and therefore respondent has no right to fish, boat or swim therein without their permission. The trial justice in effect so found.

Under point II respondent urges that this was error because he is a riparian owner on the Ponagansett River and as such he has a riparian right to use the stream for boating, swimming and fishing in its flooded condition which includes the part claimed by complainants. In making this contention respondent's counsel refers to the brook which flowed from the natural pond on complainants' land as the Ponagansett River and assumes it is navigable. However, there is no evidence that this stream was a river or that it was in fact navigable. On the contrary, a witness for complainants testified positively that it was a narrow brook filled with stones on which one could not even use a row-

boat. Moreover respondent presented no evidence that his lots bordered on such stream so as to constitute him a true riparian proprietor. Indeed his own evidence does not show that his lots even border on the reservoir. Only when the reservoir overflowed beyond its agreed height of 25 feet at the spillway did any water reach a small portion of his land.

On this evidence the trial justice did not err in finding that complainants had shown title and possession to that portion of the reservoir covering their land north of Snake Hill Road. Nor did he err in finding that respondent was not a riparian owner as he claimed. "When the owner of land on the banks of a stream has by the exercise of a right of flowage created an artificial pond upon his land the right to use the water thus stored is exclusively in such owner and the proprietors of land bordering on such artificial pond do not acquire any right in the waters therein upon the ground that by flowage the shores of the pond have been brought to their land." *Public Utilities Comm'n* v. *East Providence Water Co.*, 48 R. I. 376, 394.

In that case the owner of land bordering upon the artificial pond claimed the right to use water therefrom based on the mere fact that the flowage brought the shore of the pond to its land. In the case at bar respondent claims that the flowage in the south portion of the reservoir has made him a riparian owner with the rights appertaining thereto. Such claim is equally lacking as was the claim in the *East Providence Water Co.* case. Of course it may be true that in certain special circumstances the owners of land abutting on an artificial pond could be entitled to riparian rights therein, as we indicated in *Hood* v. *Slefkin*, R. I. , 143 A. 2d 683, 686, but respondent has shown no special circumstances that would support such a claim here.

Under this same point respondent contends that in applying the rule in actions of trespass *quare clausum fregit*

to the evidence here the trial justice misconceived the law applicable in equity to a case of this kind. He contends that complainants could prevail only by proving the strength of their own title and not by the weakness of their adversary's title and he cites *Talbot* v. *Town of Little Compton*, 52 R. I. 280, *Olney* v. *Fenner*, 2 R. I. 211, and *Head* v. *Slefkin*, *supra*. Those cases are not in point on the issue. The respondent is not claiming title to complainants' close nor are complainants questioning his title. Here the claim is solely one of threatened injury to complainants' possession and the trial justice did not err in applying the law as he did.

The respondent contends further under point II that he did not receive the benefit of a fair and impartial trial because the trial justice did not apply the same rule of law to his claim for equitable relief under his cross bill as was applied to the complainants' claim. And in connection with such contention he argues that the trial justice's action amounted to a denial of due process in violation of article XIV of amendments to the federal constitution and deprived respondent of a constitutional right of fishery under article I, sec. 17, of the state constitution.

There is no merit in any of those contentions and on the face of the record they appear to be frivolous although respondent has argued them at considerable length. The fact is the evidence clearly showed that complainants had title to most of the land under the reservoir north of Scituate Hill Road and unquestionably to all of it surrounding the natural pond and the brook that issued therefrom. On the other hand there was no evidence that respondent had title to any of the land under that part of the reservoir south of said road and certainly none showing that his land bordered on the brook which he called the Ponaganset River. Therefore the trial justice did not misconceive or misapply the law applicable to the facts before him.

respondent's reasons of appeal 1 and 4 which he has argued under point II are overruled.

Under point III he has argued reasons of appeal 2, 3, 5 and 6 substantially to the effect that the trial justice's decision is against the law and the evidence and the weight thereof. His argumentation of this point in his brief proceeds at great length and in our opinion is overburdened with numerous citations of authorities which are scarcely apposite in the light of the evidence to which he seeks to apply them. We shall not lengthen this opinion further by attempting to discuss these contentions in detail. It is sufficient to say that they are without merit on the facts found by the trial justice, which findings we cannot say are clearly wrong. In such circumstances in accordance with our well-settled rule in equity this court will not disturb his decision. *Monahan* v. *Monahan*, 83 R. I. 385.

Under point IV respondent makes certain other contentions in support of the same reasons of appeal, all of which in our opinion are clearly beside the points raised by said reasons and add nothing to what he has previously argued somewhat exhaustively under point III. It does not appear to be either necessary or desirable for us to discuss these contentions except to say that on our view of the evidence they are wholly lacking in merit, and the many authorities cited by respondent have no application to the case which was presented to the trial justice by such evidence. With reference to point IV as was noted above in our discussion of point III, we are satisfied that the trial justice did not err in his conclusions as to the law and the evidence or the weight thereof and therefore his decision will not be disturbed. Reasons of appeal 2, 3, 5 and 6 which were argued under points III and IV are overruled.

There is one final contention with reference to the terms of the injunction which should be noted before we con-

clude. The respondent contends it is not clear and definite what premises he is enjoined from trespassing upon. While the description may be difficult to follow precisely, it is clear that it refers only to the complainants' premises north of the South Killingly Road now called Snake Hill Road. This road is well defined and can be readily identified by the respondent. If he continues to boat, fish or swim in the reservoir north of that road he will be violating the injunction. Of course it is possible that other owners of land bordering on the reservoir north of the road may have riparian rights as well as the complainants, but since the respondent is not claiming such rights by, through or under them or any of them he can gain no benefit from the existence of such a possiblity.

The respondent's appeal is denied and dismissed, the decree appealed from is affirmed, and the cause is remanded to the superior court for further proceedings.

Appendix B

Equity No. 2760. Supreme Court

Theodore F. Goloskie et ux.

v.

Edgar LaLancette.

OPINION

PER CURIAM. After our decision in the above cause was filed, the respondent requested and received permission to present a motion for leave to reargue. Pursuant thereto he has filed such a motion, stating therein certain reasons on which he bases his contention that justice requires a reargument of the cause.

We have carefully considered those reasons and we are of the opinion that they raise no question which in the circumstances warrants reargument.

Motion denied.

Appendix C

State of Rhode Island and Providence Plantations

Providence, Sc. Superior Court

Eq. No. 25540

Theodore F. Goloskie, et al

v.

Edgar LaLancette

RESCRIPT

Frost, *P. J.* Heard on bill, cross-bill, replication and proof.

This is a bill of complaint brought by a man and his wife who are owners of a farm containing 225 acres in the Town of Glocester in this state against a person who is also the owner of land in the Town of Glocester.

The bill alleges that there is a fresh water pond partly on complainants' land and partly on other land adjoining that of complainants, which pond is fed by natural springs located on complainants' land; that said fresh water pond consists in part of a natural pond of approximately fifty acres located on complainants' land and in part of water which by reason of a dam has flooded the area immediately adjacent to the natural pond including a portion of complainants' land; that the dry portions of complainants' land consist of woodland and land on which are various farm buildings; that since shortly after the recording of their deed on December 6, 1943, complainants have been in possession and have occupied the entire tract of land described in their said deed.

Complainants allege that respondent has repeatedly trespassed upon their portion of the pond and upon their land and threatens to continue to do so and has addressed complainants in abusive and insulting language while on the

land and has assaulted or threatened complainants with assault.

Complainants pray that respondent be restrained from trespassing on their land both that portion which is covered by water and that which is dry land; that respondent be enjoined from abusing them and their invitees and from using vile and indecent language upon their land or elsewhere addressed to them or their invitees and such other relief as shall seem meet.

Respondent filed an answer wherein he leaves certain allegations to be proved by complainants but denies trespasses on his part and allegations relating to the use of abusive and indecent language. Respondent continues his answer in the nature of a cross-bill and alleges that he and his wife, Mae E. LaLancette, did on the 8th day of October, 1953, purchase five lots of land in the said Town of Glocester, and on the date of filing of the said answer were the owners of four of the said five lots of land; that bordering respondent's property is a natural stream of fresh water called the Ponagansett River; that respondent claims the right to the full, proper and reasonable use of the water of the said stream to which he has access from his property; that the said complainant, Theodore F. Goloskie, has molested and interfered with his, the respondent's, enjoyment of fishing and boating on the said natural stream of water.

Respondent prays that the Court enter a decree declaring that complainants are not the owners of any portion of the body of water involved in the case and do not have the exclusive right to fish, boat and swim on any portion thereof and that the said respondent is entitled to the reasonable use of the whole surface of the said body of water for the purposes of fishing, boating and swimming.

To recapitulate and make clear the claims of the parties hereto, it is the claim of the complainants that they have the sole right to the use of the water above their land for

the purpose of boating, fishing and swimming; that for respondent to pass over the water above their land in boats or to fish or swim therein is a trespass.

As opposed to complainants' claim, respondent asserts that he "is entitled to the full, proper and reasonable use of the whole surface of the said body of water for the purpose of fishing, boating and swimming," meaning by the said body of water all the water mentioned in said bill whether over complainants' land or otherwise.

In a portion of complainants' farm is a natural pond fed by springs and covering approximately fifty acres of land. Water flowed from this natural pond southerly and at some point takes the name of Ponagansett River. The natural pond has been considerably increased in size by reason of a dam that was built many years ago southerly on the stream that flows from the natural pond. Frank M. Waterman, a civil engineer, in his testimony stated that approximately 140 acres of complainants' land was covered by water. This increased acreage under water is due, of course, to the water that is held back by reason of the dam. Complainants' land, both dry land and land covered with water, is shown on Exhibit "L" which is a drawing made by Frank M. Waterman for the complainants in 1958. It is also shown on Exhibit "6", which appears to be a copy of a plan made in 1946 and recorded in the Office of the Town Clerk of Glocester.

The four lots of land owned by respondent and his wife lie somewhat southerly of complainants' land. Complainants' land lies northerly of the Old Killingly Road or as it is sometimes called, the Snake Hill Road, while respondent's land and that of his wife is southerly of that same road. The four lots are on Potter's Lane and are easterly of the Ponagansett Reservoir as shown on Exhibit "6". There was testimony that they do not extend to the natural stream but with the land flowed by reason of the dam

water reaches the four lots and there was testimony that respondent had built a wharf extending from his land into the water.

The location of complainants' land with relation to land owned by respondent and his wife may be seen by an inspection of a map of lands and flowage rights owned by the Ponagansett Reservoir Company in Glocester, R. I., By J. A. Latham & Son, November, 1917 (Exhibit "X").

It is clear from the testimony and from the exhibits in the case that any wharf which the respondent has extending from his land into the water does not extend into water covering land alleged by complainants to belong to them.

In reference to the stream of water running southerly from the natural pond beyond the Killingly Road, Mabel Frances Place, complainants' grantor, testified that there was always water in it; that it was a small brook; that you couldn't run a sailboat on it, not even a rowboat; that the stream wasn't navigable.

In this case while there is certain incidental relief prayed for the main relief which is sought is an injunction restraining the respondent from boating, fishing and swimming on or in that portion of the water northerly of Old Killingly Road or Snake Hill Road and over land claimed by the complainants to be theirs. That raises the question of what it is necessary for complainants to show in order to gain such relief. The action brought is one in equity to avoid continual trespasses and multiplicity of suits. If it were an action at law for a single alleged trespass it would be an action of *trespass quare clausum fregit* but in either case the complainants have the same burden.

In 63 C. J., *Title, Trespass*, it is stated at *page 908, Section 25, C (1)*:

> "Possession, although tortious, under color of title or claim of right is sufficient right. Such possession

must be actual, but where once actual it continues without further actual occupation or acts of possession unless abandoned. * * * "

See also *Sections 26, 27 and 28*

In *52 Am. Jur.* it is stated at page 855:

"Actual possession of real estate without title, or with a defective title, is always sufficient to sustain an action of trespass quare clausum fregit against one having no superior right. Even a person who has acquired possession illegally may maintain trespass against anyone who unlawfully disturbs his possession. Indeed, possession without right can only be disturbed by the rightful owner of the land, or by someone claiming under him; and the defendant in an action of trespass may not set up in defense the title of a third person between whom and himself there is no privity or connection. * * * "

and at page 865:

Ownership, together with a right of possession, is a defense to liability for a trespass. However, a plea of title in a third person may not be set up by a defendant who is not in privity of title with such third person. Similarly, since, as against one in possession, an intruder must justify his invasion by virtue of his own title, and not by the weakness of the plaintiff's title, the fact that the plaintiff's title was defective is not a defense to liability in trespass."

The case of *Carpenter v. Longo*, 24 R. I. 388 (1902), was an action of trespass wherein the plaintiff claimed to

the owner of a tract of woodland upon which the defendant trespassed by cutting trees and carrying away wood. The Court stated at page 386:

> "* * * As stated above, constructive possession may avail a plaintiff in trespass *quare clausum* who enters under a title which purports to convey the whole tract; but where the absolute title to an entire tract is in question, the constructive possession of a defendant entering under a similar title may equal that of the plaintiff. The plaintiff's title, however, if *prima facie* sufficient, will stand until overcome by a better title."

Lavin vs. *Dodge*, 30 R. I. 8 (1909) was an action of trespass *quare clausum* for breaking and entering the close of the plaintiff. In that case the Court said at page 11:

> "The gist of this action is the injury to the possession. In trespass and ejectment, which is an action distinctively to try title, upon a plea of the general issue the plaintiff must prove title as a *sine qua non* of maintaining an action. In trespass *quare clausum*, possession alone is sufficient to maintain the action unless the defendant defends upon the ground that the title was in him and hence that there was no trespass, in which case the defendant must specially plead title in himself, or *liberum tenementum*, as it is called." *Schaeffer* v. *Brown*, 23 R. I. 364.
>
> "'The action being trespass *quare clausum*, the only issues were the possession of the plaintiff and the acts of trespass by the defendant. . . . The question of title in such an action is only put in issue upon the setting up of title in the defendant.' *Sanders* v. *Mitchell*, 22 R. I. 238."

In *Campbell* v. *Rankin*, 99 U. S. 261 (1878), the plaintiff was suing defendant because the latter had wrongfully entered upon a portion of plaintiff's mining claim and had taken away large portions of gold-bearing earth. At page 262 Mr. Justice Miller said:

> "In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of the action has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. 2 Greenl. Evid., sect. 311. * * *"

See also *Hughes* v. *Graves*, 39 Vt. 359 (1867).

Boulger and another vs. *Walker et al.*, 89 Mass. 21 (1864) where in an action of trespass the Court said of a plaintiff who claimed title by adverse possession, at page 22:

> "This occupation constituted a good possessory title against all persons who had not a better title. * * *"

In the light of the principles enunciated in the foregoing cases it is necessary to consider some facts brought out at the hearing. Complainants purchased the land more or less in controversy in this case from Mable F. Place of Worcester, by warranty deed dated the 6th day of November, 1943. (Exhibit "A".) Since that time the complainants have lived on the property during the summer months of each year. Substantial improvements to land and buildings have been made amounting in cost to several thousand dollars. Up to the time when the present bill was filed it does not appear that their title or their possession was questioned. In this case respondent does question

plainants' title and in doing so appears to rely upon respondent's Exhibit "3". It is unnecessary in this case to determine whether complainants have a clear title. Upon the evidence and the law applicable thereto complainants have color of title or apparent title by reason of their deed, (Exhibit "A") and their continuous occupation of the land conveyed therein since 1943 and that is sufficient here. Respondent does not claim to have title to any portion of complainants' land nor does he claim to be in privity with any one who does claim title to any part of the land.

The Court therefore finds that respondent has no right to swim in, sail or row boats on or fish in the water which is over the land herein claimed by the complainants to belong to them.

See *Commonwealth Water Co. v. Kenney, et al.* 161 N. Y. Supp. 794 (1916)

Trapp v. Richter, 142 N. Y. Supp. 563 (1913)

Respondent claims to be a riparian owner, so-called, on the easterly bank of the Ponaganset Reservoir south of the Snake Hill Road and by reason thereof entitled to use the whole surface of the Reservoir for purposes of boating, swimming and fishing.

Respondent on the evidence before the Court is not a riparian owner in the sense that his land reaches or borders the Ponaganset River in its natural state. His land does, however, extend to the water of the Reservoir when the gate of the dam is closed and the water is caused to rise to the height of the dam.

Respondent's claim is made on the theory that the brook or river near or abutting on his land is a navigable stream. The only evidence before the Court is that the brook or river is not a navigable stream. No evidence on that point was offered by the respondent. The fact that a

dam was built and land flooded does not in the opinion of the Court give to this respondent rights which he would have if his land bordered a navigable river and he were a riparian owner thereon.

Commonwealth Water Co. v. *Brunner, et al.*, supra
Tripp v. *Richter*, supra

Complainants allege an assault upon Goloskie by LaLancette. There was no eye witnesses to the incident testified to by Goloskie and in the opinion of the Court Goloskie was not proved by a fair preponderance of the evidence that he was assaulted. It is also averred in the bill that LaLancette used vile and vulgar language. This averment has not been proved since Goloskie declined to state the language used by the respondent herein. The Court has no means therefore of knowing whether what he said should be characterized as vile and vulgar language.

Respondent in his answer in the nature of a cross bill relies upon *Section 17 of Article I of the Constitution* of this state as giving respondent a right to fish in water over complainant's land. In the opinion of the Court this section has no application to the situation presented herein. Respondent's answer in the nature of a cross-bill is denied.

A decree may be entered enjoining the respondent from sailing, rowing or riding in boats, from fishing or swimming and from inciting others to do such acts upon or in the water which is above complainants' land described in the bill or however described from trespassing on the water over said land of the complainants.

Appendix D

State of Rhode Island and Providence Plantations
Providence, Sc. Superior Court
Eq. No. 25540

Theodore F. Goloskie, et al
v.
Edgar LaLancette

FINAL DECREE

This cause came on to be heard upon final hearing on bill, answer, answer in the nature of a cross bill, replication and proof, and thereupon, upon consideration thereof, it hereby is ORDERED, ADJUDGED and DECREED:

First: That the respondent, his agents, and servants, invitees and licensees be and hereby are permanently enjoined and restrained from sailing or rowing boats, from riding in boats and from fishing and or swimming and from inviting others to do such acts upon or in the water upon the tract or parcel of land set forth and referred to in complainants' bill of Complaint, being described as follows:

Northerly on land now or formerly of David Page, easterly on the highway and land now or formerly of Joseph Davis' heirs, southerly on land now or formerly of Smith Peckham and the South Killingly Road, and Westerly on land now or formerly of Theodore D. F. Hammond and Amasa Tucker. Being all real estate formerly owned by the late Othniel Saunders and or his late wife or widow, Mercy Saunders, whether the foregoing description be sufficiently

broad or not, and including the property conveyed to the said late Mercy Saunders by Alvin H. Shippee, administrator of the estate of Othniel Saunders, by deed dated July 22, 1871, and recorded in Glocester Land Records in Book No. 27 at Page 628, the latter parcel being subsequently conveyed to complainants' grantor, Mabel F. Place, of said Town of Glocester, by Executrix' Deed of Amey J. Saunders, through her duly qualified executrix, Hannah S. (or M.) Mann, and recorded in said Glocester Land Records in Book No. 45, at page 475, the intent of which said last-mentioned deed having been to convey to the said Mabel F. Place, whether the description therein was sufficiently broad or not, all the real estate owned by the said late Othniel Saunders and or his late wife or widow, Mercy Saunders.

Second: That the prayers of the answer of the respondent in the nature of a cross bill be and the same hereby are denied.

Entered as a Decree of this Court this 2nd day of January, 1959.

By Order
(s) Joseph T. Curran
Asst. Clerk

ENTER:

(s) G. Frederick Frost
Presiding Justice of the
Superior Court
Jan. 2, 1959

Appendix E

PERTINENT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. ******; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

PERTINENT PROVISIONS OF GENERAL LAWS OF RHODE ISLAND OF 1956

"ENGINEERS AND LAND SURVEYORS

5-8-1. Definition of terms.- *****

The practice of "land surveying" within the meaning and intent of this chapter includes responsible supervision of surveying of areas for their correct determination and description and for conveyancing, or for the establishment or reestablishment of land boundaries and the plotting of lands and subdivisions thereof (Vol. 1, p. 649)"

"Equity Practice

9-14-9. Answer in the nature of cross bills.-Defendant No cross bill shall be necessary in any suit in equity, and no cross petition in divorce proceedings, but the respondent in any such suit or proceeding may avail himself of any matter which would be open to him upon a cross bill or petition, by setting up such matter in his answer, or, in divorce proceedings, by motion in writing setting forth the ground therefor; and the court, upon hearing the cause, may make any decree for or against either party, interlocutory or final, warranted by the merits of the cause, that it could make in such suit or proceeding had a cross bill or cross petition been filed therein (Vol. 2, p. 5898).

9-14-12. Formal replication not required.- No formal replication shall be required, but that statement by the plaintiff that he joins issue on the answer or plea shall have the same effect as if formal replication had been

made (Vol. 2, p. 590) (Formerly Sec. 9, C. 528, G. L. 1938).

9-14-23. Declaratory decrees. "No suit in equity shall be defeated on the ground that a mere declaratory decree is sought, but the court may make binding declarations of right in equity without granting consequential relief (Vol. 2, p. 597)."

"Evidence

9-19-13. Book entries in regular course of business. In any civil proceeding any writing or record, whether in the form of an entry in a book or otherwise, made as a memoradum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, ***. And when such evidence shall be admitted, all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to affect its weight ***. (Vol. 2, p. 632, 633)

Appendix G

"Commission on Discovery and Utilization of Public Rights-of-Way

Sec. 42-33-4. Duties of commission.- The commission shall carry on a continuing discovery of the public rights-of way to the water areas of the state, and for this purpose shall have access to all state and local records pertaining to the water areas and the land adjacent thereto. It shall define and mark and cause to be opened for the public use all discovered rights-of-way which it shall deem feasible (Vol. 6, 1959, Pocket Supplement, pp. 95, 96).

Sec. 42-33-7. Injunction to prevent blocking of right-of-way.- The commission is empowered to apply to any court of competent jurisdiction for an injunction to prevent the unlawful posting or blocking of any public right-of-way (Vol. 6, Pocket Supplement, p. 96)."